

*United States Court of Appeals
for the Second Circuit*



APPENDIX

76-1457

To be argued by
JONATHAN J. SILBERMANN

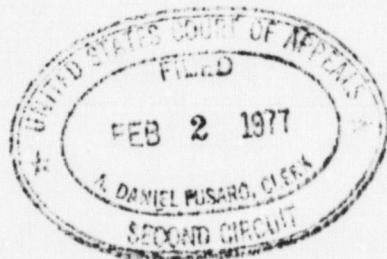
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
-against- :
PAUL WILLIAMS, :
Defendant-Appellant. :
-----X

B
PJS
Docket No. 76-1457

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
PAUL WILLIAMS
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

COURT - CRIMINAL DOCKET

GE/ Assigned Trial
NISTRATE 0721
7 1 Disp./Sentence
District Office

76 CR 150
PAUL WILLIAMS

Case Filed
Day Mo.
27 2
No. of
2
Defendants

Yr. 76
Doc. 150
BRAMWELL

U.S. Attorney Ass't
21-841(a)(1)
18-2

Did possess with intent to
distribute and did distribute heroin

Counts
6

(s) 21:841(a)(1)

Did possess with intent to distribute
cocaine hydrochloride

U.S. Attorney Ass't
V. Rocco

Legal Aid

MAGR.
CASE NO. 75M1500

BAIL & RELEASE

Personal Recog.
Denied Unsecured Bond
AMT Conditional Release
Set (000) \$10
9-1975
 10% Deposit
 Surety Bond
 Collateral
 Bail Not Made
 Bail Status Changed
(See Docket)
 3rd Party Custody
 PSA

ARREST.

INDICTMENT

ARRAIGNMENT

TRIAL

SENTENCE

9-9-75 or
U.S. Custody
Began on Above
Charges

High Risk
Defn. &
Date Design'd

Information
2-27-76

Waived

Superseding
Indict/Info
5/18/76

3/2/76

1st Plea A

Final Plea

Trial Set For
5-12-76

Not Guilty
 Noto
 Not Guilty
 Nolo
 Guilty

Voir Dire
Trial Began 7/1/76 N
Trial Ended 7/16/76

16/1/76

Prosecution Deferred

Disposition

Convicted On All Charge
 Acquitted On Lesser
Offense(s)
 Dismissed: WOP; WWP
 Nolled/Discontinued*

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
	Return			PRELIMINARY EXAMINATION OR REMOVAL HEARING <input checked="" type="checkbox"/> Waived <input type="checkbox"/> Not Waived	Date Scheduled _____ Date Held _____ <input type="checkbox"/> Intervening Indictment	Dismissed <input type="checkbox"/> Held for District GJ <input checked="" type="checkbox"/> Held to Answer to U. S. District Court
Summons	Issued					
Served						
Arrest Warrant	9-9-75	MS /070B				
COMPLAINT	II	4	Tape No.	INITIAL/No.	BOND	
OFFENSE (In Complaint)	Possession with intent to distribute heroin (one ounce)					Magistrate's Initials

* Show last names and suffix numbers of other defendants on same indictment/information

WHITE 2

PROCEEDINGS

V. Excludable Delay

(a)	(b)	(c)	(d)

DATE PROCEEDINGS

2-27-76 Before BARTELS, J - Indictment filed
3-2-76 Before BRAMWELL, J - case called - deft & counsel S. Chrein present - deft arraigned and waives reading of indictment and enters a plea of not guilty - 30 days for motions - case adjd to May 12, 1976 for trial. Bail contd
3-3-76 Notice of Readiness for Trial filed
5-12-76 Before BRAMWELL, J - case called - deft & counsel present - case adjd to May 26, 1976 for trial
5/18/76 Before PLATT, J. - SUPERSEDING INDICTMENT FILED
5/26/76 Before BRAMWELL, J. - Case called - deft and counsel present deft arraigned and enters a plea of not guilty - case adjd to 6/3/76 at 10:00 A.M. for trial - bail contd
6/3/76 Before BRAMWELL, J. - Case called - deft not present - counsel Edward Kelly of Legal Aid present - case adjd to 6/21/76 at 10:00 A.M. for trial
6-21-76 Before BRAMWELL, J - case called - deft & counsel EKelly present - adjd to July 12, 1976 for trial
7/12/76 Before BRAMWELL, J. - Case called. Deft & Counsel Edward Kelly of Legal Aid present. Trial ordered. Selection of jurors begun. Court excused 4 for Court. Trial adjourned to July 14th, 1976 at 10:00 a.m.

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
7/14/76	Before BRAMWELL, J. - Case called. Deft & counsel present. Trial resumed. Trial continued to 7/15/76 at 11:00 a.m.				
7-15-76	Before BRAMWELL, J - case called - deft & counsel Edw. Kelly present - trial resumed - Trial contd to 7-16-76 at 2:00 PM.				
7/16/76	Before BRAMWELL, J. - Case called. Deft & Counsel present. Trial resumed. Jury rendered a verdict of guilty on Counts 1,2,5, & 6. Jury polled. Jury discharged. Defts motion to set aside verdict etc. - Motion denied. Deft ordered to report to Probation Dept on 7/19/76 at 10:00 a.m. Bail continued & sentence adjourned without date. Trial concluded.				
10/1/76	Before BRAMWELL, J.- Case called. Deft & Counsel present. Deft sentenced to imprisonment for a period of 10 years on Count 1 plus a Special Parole Term of 7 years, and on Cts 2,5, & 6 deft is sentenced to imprisonment for a period of 10 yrs plus a Special Parole Term of 7 years. Counts 2,5, & 6 are to run concurrent with each other and concurrent with sentence imposed in Count 1. Bail continued pending appeal. Deft advised of his right to appeal in forma pauperis. On motion of AUSA Victor Rocco, the original indictment is dismissed. Judgment & Commitment filed. Certified copies to Marshals and Probation.				
10/5/76	Notice of Appeal filed.				
10/5/76	Docket entries and duplicate of Notice of Appeal filed and sent to Court of Appeals.				
10-21-76	Order received from the court of appeals that the Record on appeal be filed on or about November 18, 1976.				
11-15-76	Five (5) Stenographer's Transcript dated May 26, 1976; July 14, 1976; July 15, 1976; July 16, 1976 and Filed.				

A 10/11/76
 7/16/76
 Edw. Kelly
 BY

TRP:VJR:ald
F.# 761,677

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ MAY 18 1976 ★

B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

----- X
UNITED STATES OF AMERICA

SUPERSEDING INDICTMENT

- against -

PAUL WILLIAMS and
DAVID WHITE,

Cr. No. 76 CR 150 (S)
(Title 21, U.S.C. §841(a)(1);
Title 18, U.S.C. §2)

Defendants.

----- X
THE GRAND JURY CHARGES:

COUNT ONE

On or about the 10th day of July, 1974, within the Eastern District of New York, the defendants, PAUL WILLIAMS and DAVID WHITE, knowingly and intentionally did possess with intent to distribute approximately 91.7 grams (net weight) of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a); Title 18 United States Code, Section 2).

COUNT TWO

On or about the 10th day of July, 1974, within the Eastern District of New York, the defendants, PAUL WILLIAMS and DAVID WHITE, knowingly and intentionally did distribute approximately 91.7 grams (net weight) of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2).

COUNT THREE

On or about the 21st day of May, 1974, within the Eastern District of New York, the defendant, DAVID WHITE, knowingly and intentionally possessed with intent to distribute approximately 15.78 grams (net weight) of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT FOUR

On or about the 21st day of May, 1974, within the Eastern District of New York, the defendant, DAVID WHITE, knowingly and intentionally did distribute approximately 15.78 grams (net weight) of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT FIVE

On or about the 19th day of April, 1974, within the Eastern District of New York, the defendants, PAUL WILLIAMS and DAVID WHITE, knowingly and intentionally did possess with intent to distribute approximately 28.4 grams (net weight) of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2).

COUNT SIX

On or about the 19th day of April, 1974, within the Eastern District of New York, the defendants, PAUL WILLIAMS and DAVID WHITE, knowingly and intentionally did distribute approximately 28.4 grams (net weight) of heroin hydrochloride, a Schedule I narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2).

A TRUE BILL.

Joseph M. McNamee
FOREMAN.

David G. Trager

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

No. _____

UNITED STATES DISTRICT COURT

EASTERN *District of* NEW YORK

Division

THE UNITED STATES OF AMERICA

vs.

PAUL WILLIAMS and DAVID WHITE,

Defendants.

INDICTMENT

(T. 21, U.S.C. §841(a)(1);
T. 18, U.S.C. §2)

A true bill,

Foreman.

*Filed in open court this _____ day
of _____, A. D. 19_____*

Clerk.

Bail, \$_____

V.J.ROCCO, AUSA 596-3415

900-902-482

Charge

14 The evidence, I submit to you, consists of
15 the theory or the fact that Paul Williams is guilty
16 on each and every count in the indictment. Paul
17 Williams met with Detective Pons on two occasions,
18 on April 19, 1974, on that occasion sold him an ounce
19 t of heroin; he met with Detective Pons on a second
20 occasion, on July 10, 1974, and on that occasion sold
21 him three ounces of cocaine. Thank you, Ladies and
22 Gentlemen.

23 THE COURT: I'm going to charge the jury. If
24 anyone wishes to leave they may do so now. They may
25 not leave during the charge.

Charge

Ladies and gentlemen, the case was short, the charge itself contains the law that the Court must charge the jury in connection with this particular case. I ask that you be patient and give the Court your indulgence so that the Court may give you the law that you are required to have in this case.

Mr. Foreman, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings. The Court will now charge you on the law to be applied to the facts in the case.

As you may recall, I initially gave you a precharge as to the manner in which the case would be presented to you. I told you that most of the evidence in the case would come in the form of the testimony of witnesses, and that you were to pay special attention to the manner in which the witnesses testified.

I believe I also instructed you that you would be the judges of the facts in the case, that being your sole province; that you recollection of the facts after having heard all of the evidence in the case, the testimony of witnesses and the documentary proof, was to control the determination of the issues.

Likewise at that time I told you that I would

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Charge - 1000

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be the judge of the law. This has not changed at this stage of the proceedings. I will not review the facts in this case for you because I am certain that with summations by the attorneys there is no need for the Court to review the facts. In any event, if you find that there is some fact in the case that you may have forgotten or don't recollect, or you can't agree with each other in your deliberations, you can have it read back from the record, and that will, I am sure refresh your memory.

In any event, I am the judge of the law. You must accept what I say to be the law in this case.

Now, the attorneys have been permitted by the Court and by the rules to make opening statements and summations to you.

Under no circumstances are the statements they have made by way of opening or by way of summation to be taken as evidence. However, the Court and the law does permit you to take the arguments that they have proffered before you and weigh those arguments. And if you agree with what they have said on either side of the case you may use those arguments in your deliberations, and in discussing the case with each other, and try to convince one another as to what the

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1 Charge

2 final determination shall be with reference to the
3 deliberations at hand.4 If you feel that the arguments are not commen-
5 surate with the testimony and the proof in the case,
6 you may disregard them. The arguments are not
7 evidence. You need not weigh them. However, there
8 are times when the arguments of the attorneys will
9 give you an insight as to something you may have
10 missed, and you may discuss that portion of it if
11 you so desire.12 Now, of course, I also said to you that during
13 the trial the Court will be the judge of the law.
14 Likewise, as to motions which at times we've had at
15 a sidebar, as you may recall. That was not for the
16 purpose of keeping any of the proof from you, but
17 were matters of law that were discussed between the
18 attorneys and the Court itself and should not have
19 come before you. In any event, if you feel that you
20 have discovered by some stretch of your imagination
21 what this Court thinks as to either some of the
22 testimony or the case itself, you should remove that
23 from your mind because I tell you here and now I
24 have come to no conclusion in this case, nor have I
25 indicated to you in any way whatsoever what my feeling

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"Charged to you"

2 is with reference to the facts in the case or with
3 reference to the guilt or innocence of the defendant.
4 That is your province and your job. You should not
5 try to weigh what you believe the Court's impression
6 may be.

7 You must understand that the lawyers who appear
8 before you are advocates. They are advocating the
9 best case they can for the parties they represent
10 and they have a right to exercise as much forcefulness
11 as they desire in their questioning or otherwise in
12 presenting their case. I say this because this is
13 within the framework of the ordinary trial.

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Objections and rulings.

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It is the duty of the attorney on each side
of a case to object when the other side offers testi-
mony or other evidence which the attorney believes
is not properly admissible. You should not show
prejudice against an attorney or his client because
the attorney has made objections.

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Upon allowing testimony or other evidence to
be introduced over the objection of an attorney, the
Court does not, unless expressly stated, indicate any
opinion as to the weight or effect of such evidence.

As stated before, the jurors are the sole judges of

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Charge
for ~~the~~ ~~defendant~~

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2 the credibility of all witnesses and the weight and
3 effect of all evidence.

4 When the Court has sustained an objection to
5 a question addressed to a witness the jury must
6 disregard the question entirely, and they draw no
7 inference from the wording of it, or speculate as to
8 what the witness would have said if he had been
9 permitted to answer any question.

10 In determining the facts, the jury is reminded
11 that before each member was accepted and sworn to act
12 as a juror, he was asked questions regarding his
13 competency, qualifications, fairness and freedom from
14 prejudice or sympathy. On the face of those answers
15 the juror was accepted by the parties. Therefore,
16 those answers are as binding on each of the jurors
17 now as they were then and should remain so until the
18 jury is discharged from consideration of this case.

19 You cannot decide that you do not like the
20 sections of the law that I will quote to you or any
21 other part of the charge. You have the obligation of
22 accepting the law as I charge it, just as I have the
23 obligation of accepting your findings of fact in your
24 ultimate verdict as to the guilt or innocence of the
25 defendant as to each charge.

8 1

Charge - Page 7

2 It lends for predictability and stability if
3 judges throughout the country in types of charges
4 such as this, charge uniformly or substantially so
5 and that juries accept it. It would be unfair for you
6 to decide this case on your own notions on what the
7 law should be, and another jury decided on their own
8 notions and what the law should be.

9 That is why the obligation is a firm one and
10 one that you should understand.

11 Of course you know by this time that this case
12 has come before you by way of an indictment presented
13 by a Grand Jury sitting in this Eastern District.
14 That indictment charges the defendant with the counts
15 I shall now read to you. Remember the indictment is
16 merely an accusation, merely a piece of paper. It is
17 not evidence and is not proof of anything.

18 The indictment reads as follows:

19 Now, I might say in connection with the indict-
20 ment, the indictment includes David White as a defen-
21 dant and further in connection with the trial of this
22 case there was testimony as to one Lance Hargrove.
23 Now, as to David White and Lance Hargrove, the jury
24 is to draw no presumptions and no inferences by virtue
25 of the fact that they are not on trial at this time.

9 1 Charge
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This case that you are to deliberate on involves only Paul Williams as a defendant; no presumption or inferences are to be drawn as to the other parties.

Now, count one.

On or about the 10th day of July, 1974, within the Eastern District of New York, the defendants Paul Williams and David White, knowingly and intentionally did possess with intent to distribute approximately 91.7 grams (net weight) of cocaine hydrochloride, a Schedule 2 narcotic drug controlled substance in violation of Title 21, United States Code, Section 841(a); Title 18 United States Code, Section 2.

Count two.

On or about the 10th day of July, 1974, within the Eastern District of New York, the defendants Paul Williams and David White, knowingly and intentionally did distribute approximately 91.7 grams (net weight) of cocaine hydrochloride, a Schedule 2 narcotic drug controlled substance in violation of Title 21, United States Code, Section 841(a)(1); Title 18, United States Code, Section 2.

Count five.

On or about the 19th day of April, 1974, within the Eastern District of New York, the defendants Paul

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Charge - ~~Indictment~~

2 Williams and David White, knowingly and intentionally
3 did possess with intent to distribute approximately
4 28.4 grams (net weight) of heroin hydrochloride, a
5 Schedule 1 narcotic drug controlled substance in
6 violation of Title 21 United States Code, Section
7 841(a)(1); Title 18 United States Code Section 2.

8 Count six.

9 On or about the 19th day of April, 1974, within
10 the Eastern District of New York, the defendants Paul
11 Williams and David White, knowingly and intentionally
12 did distribute approximately 28.4 grams (net weight)
13 of heroin hydrochloride, a Schedule 1 narcotic drug
14 controlled substance in violation of Title 21 United
15 States Code, Section 841(a)(1); Title 18, United
16 States Code, Section 2.

17 Now, I'll give you some general introductory
18 remarks regarding the statutes applicable to counts
19 one and five in this case.

20 The individual counts numbered one and five
21 of this indictment are both based on the very same
22 sections of the very same two statutes which I will
23 read for you in a few moments, to wit, Title 21 of
24 the United States Code, Section 841(a)(1) and Title
25 18 of the United States Code, Section 2.

Charge
Indictment - 1000

11 1
2 Let me emphasize this to you for it is of
3 crucial importance, although the counts numbered one
4 and five are based on the very same sections of the
5 very same statutes, each count charges a separate
6 offense occurring on or about a different time and
7 involving a different narcotic drug controlled sub-
8 stance.

9 Therefore, each count should be carefully,
10 seriously and separately and individually considered
11 by you as such.

12 I will now read for you the applicable rule
13 governing the separate and individual counts numbered
14 one and five.

15 Please apply this law to each of the afore-
16 mentioned counts separately and individually. In
17 each case ask yourselves in applying the law to each
18 factual transaction set out in the individual counts,
19 numbered one and five, has the Government met its
20 burden of proof as to each such count when considered
21 separately and individually.

22 Counts one and five of the indictment are
23 based on Title 21 of the United States Code, Section
24 841(a)(1) and Title 18 of the United States Code,
25 Section 2.

Charge
Cocaine and Heroin

//

2 Title 21 of the United States Code, Section
3 841(a)(1) provides in pertinent part as follows:

4 "It shall be unlawful for any person knowingly
5 or intentionally to possess with intent to distribute
6 a controlled substance."

7 You are instructed as a matter of law in
8 considering count one of the indictment that cocaine
9 is a controlled substance.

10 In considering count one of the indictment
11 that cocaine is a controlled substance.

12 In considering count five of the indictment
13 you are instructed as a matter of law that heroin is
14 a controlled substance.

15 As I have previously advised you both counts
16 one and five of the indictment are also based on
17 Title 18 of the United States Code, Section 2.

18 Now, in a case where two or more persons are
19 charged with the commission of a crime, the guilt of
20 any defendant may be established without proof that
21 he personally did every act constituting the offense
22 charged.

23 Section 2 of Title 18 of the United States
24 deals with the aiding and abetting of the commission
25 of an offense against the laws of the United States.

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Charge

2 Section 2 provides in pertinent part as follows:

3 "Whoever commits an offense against the
4 United States, or aids, abets, counsels, commands,
5 induces, or procures its commission, is punishable
6 as a principal."

7 "Whoever willfully causes an act to be done,
8 which if directly performed by him or another would
9 be an offense against the United States is punishable
10 as a principal."

11 In other words, every person who willfully
12 participates in the commission of a crime may be found
13 to be guilty of that offense. Participation is
14 willful if done voluntarily and intentionally, and
15 with the specific intent to do something the law
16 forbids, or with the specific intent to fail to do
17 something the law requires to be done; that is to say,
18 with bad purpose either to disobey or to disregard
19 the law.

20 "aid and abet" - defined.

21 In order to aid and abet another to commit a
22 crime it is necessary that the accused willfully
23 associated himself in some way with the criminal
24 venture and willfully participate in it as he would
25 in something he wishes to bring about; that is to

Charge
Accomplice

14 1

2 say that he willfully seek by some act or omission
3 of his to make the criminal venture succeed.

4 An act or omission is "willfully" done, if
5 done voluntarily and intentionally and with the
6 specific intent to do something the law forbids, or
7 with the specific intent to fail to do something the
8 law requires to be done; that is to say with bad
9 purpose either to disobey or to disregard the law.

10 You of course may not find any defendant
11 guilty unless you find beyond reasonable doubt that
12 every element of the offense as defined in these
13 instructions was committed by some person or persons,
14 and that the defendant participated in its commission.

15 "Willfully" to cause criminal act - defined.

16 In order to cause another person to commit a
17 criminal act, it is necessary that the accused will-
18 fully do, or willfully fail to do, something which,
19 in the ordinary performance of official duty, or in
20 the ordinary course of the business or employment of
21 such person, or by reason of the ordinary course of
22 nature or the ordinary habits of life, results in the
23 other person's either doing something the law forbids,
24 or failing to do something the law requires to be
25 done.

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15 1 Charge
Supervision-Posse

2 An act or a failure to act is "Willfully"
3 done, if done voluntarily and intentionally, and with
4 the specific intent to do something that the law
5 forbids, or with the specific intent to fail to do
6 something the law requires to be done; that is to
7 say, with bad purpose either to disobey or to disregard
8 the law.

9 "Mere presence" not sufficient.

10 Mere presence at the scene of the crime and
11 knowledge that a crime is being committed are not
12 sufficient to establish that the defendant aided and
13 abetted the crime, unless you find beyond a reasonable
14 doubt that the defendant was a participant and not
15 merely a knowing spectator.

16 To determine whether a defendant aided and
17 abetted the commission of an offense, you ask your-
18 selves these questions: Did he associate himself
19 with the venture? Did he participate in it as some-
20 thing he wished to bring about? Did he seek by his
21 action to make it succeed? If he did, then he is a
22 aider and abettor.

23 "Essential elements of the offense"

24 Count one of the indictment charges that the
25 defendant, Paul Williams, did knowingly and

16 1

Charge

2 intentionally possess with intent to distribute
3 cocaine, a Schedule 2 narcotic drug controlled
4 substance.

5 The essential elements of this offense, each
6 of which the Government must prove beyond a reasonable
7 doubt:

8 First: That the defendant, Paul Williams,
9 possessed cocaine, a Schedule 2 narcotic drug con-
10 trolled substance, on or about the 10th day of July,
11 1974, within the Eastern District of New York; and

12 Second: That the defendant, Paul Williams,
13 did so possess with a specific intent to distribute
14 cocaine, a Schedule 2 narcotic drug controlled
15 substance; and

16 Third: That the defendant, Paul Williams,
17 did so knowingly and intentionally.

18 "Essential elements of the offense"

19 Count five of the indictment charges that the
20 defendant, Paul Williams, did knowingly and intention-
21 ally possess with intent to distribute heroin, a
22 Schedule 1 narcotic drug controlled substance.

23 The essential elements of this offense, each
24 of which the Government must prove beyond a reasonable
25 doubt are:

15

7 1 Charge

2 First: That the defendant Paul Williams,
3 possessed heroin a Schedule I narcotic drug controlled
4 substance on or about the 18th day of April, 1974,
5 within the Eastern District of New York; and

6 Second: That the defendant, Paul Williams,
7 did so possess with a specific intent to distribute
8 heroin, a Schedule narcotic drug controlled substance
9 and

10 Third: That the defendant, Paul Williams did
11 so knowingly and intentionally.

12 You are reminded that in considering each of
13 the essential elements of the crime charged in counts
14 one and five of the indictment, that whoever aids,
15 abets, counsels, commands, induces or procures the
16 commission of an offense against the laws of the
17 United States is punishable as a principal. In order
18 to aid or abet the commission of an offense against
19 the laws of the United States, a person must associate
20 himself with the criminal venture, participate in it
21 and try to make it succeed.

22 As stated before, the burden is always upon
23 the Government to prove beyond a reasonable doubt
24 every essential element of the crime charged.

25 Always remember that the law never imposes

18 1 Charge

2 upon a defendant in a criminal case the burden or
3 duty of calling any witnesses or producing any evidence.

4 "General introductory remarks regarding the
5 statutes applicable to counts two and six in this
6 case".

7 The individual counts numbered two and six of
8 this indictment are both based on the very same two
9 statutes which I will read for you in a few moments,
10 to wit, Title 21 of the United States Code Section
11 841(a)(1) and Title 18 of the United States Code,
12 Section 2.

13 Let me emphasize this to you for it is of
14 crucial importance, although the counts numbered two
15 and six are based on the very same sections of the
16 very same statutes, each count charges a separate
17 offense occurring on or about a different time and
18 involving a different narcotic drug controlled sub-
19 stance.

20 Therefore, each count should be carefully,
21 seriously and separately and individually considered
22 by you as such.

23 I will now read for you the applicable law
24 governing the separate and individual counts number
25 two and six. Please apply this law to each of the

19 Charge

2 aforementioned counts separately and individually.

3 In each case ask yourselves, in applying the law to
4 each factual transaction set out in the individual
5 counts, number two and six, has the Government met
6 its burden of proof as to each such count when con-
7 sidered separately and individually?

8 Counts two and six of the indictment are based
9 on Title 21 of the United States Code, Section 841(a)(1)
10 and Title 18 of the United States Code, Section 2.

11 Title 21 of the United States Code, Section
12 841(a)(1) provides in pertinent part as follows:

13 "It shall be unlawful for any person knowingly
14 or intentionally to distribute a controlled substance".

15 You are instructed as a matter of law in con-
16 sidering count two of the indictment that cocaine is
17 a controlled substance.

18 In considering count six of the indictment, you
19 are instructed as a matter of law that heroin is a
20 controlled substance.

21 As I have previously advised you, both counts
22 two and six of the indictment are also based on Title
23 18 of the United States Code, Section 2.

24 As I previously indicated to you, in a case
25 where two or more persons are charged with the commission

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2 of a crime, the guilt of any defendant may be
3 established without proof that he personally did
4 every act constituting the offense charged.

5 To facilitate your understanding, I will
6 reread Section 2 of Title 18 of the United States
7 Code which deals with the aiding and abetting of the
8 commission of an offense against the laws of the
9 United States. Section 2 provides in pertinent part
10 as follows:

11 "Whoever commits an offense against the United
12 States, or aids, abets, counsels, commands, induces,
13 or procures its commission, is punishable as a
14 principal".

15 "Whoever willfully causes an act to be done,
16 which if directly performed by him or another would
17 be an offense against the United States is punishable
18 as a principal".

19 As I previously explained to you, in other
20 words, every person who willfully participates in
21 the commission of a crime may be found to be guilty
22 of that offense. Participation is willful if done
23 voluntarily and intentionally, and with the specific
24 intent to do something the law forbids, or with the
25 specific intent to fail to do something the law

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2 requires to be done; that is to say, with bad purpose
3 either to disobey or disregard the law.

4 It is very important that I once again go over
5 with you certain important definitions.

6 "Aid and abet" - defined.

7 In order to aid and abet another to commit a
8 crime it is necessary that the accused willfully
9 associate himself in some way with the criminal
10 venture, and willfully participate in it as he would
11 in something he wishes to bring about; that is to say,
12 that he willfully seek by some act or omission of
13 his to make the criminal venture succeed.

14 An act or omission is "Willfully" done, if
15 done voluntarily and intentionally and with the
16 specific intent to do something the law forbids or
17 with the specific intent to fail to do something the
18 law requires to be done; that is to say, with bad
19 purpose either to disobey or to disregard the law.

20 You of course may not find any defendant
21 guilty unless you find beyond reasonable doubt that
22 every element of the offense as defined in these
23 instructions was committed by some person or persons,
24 and that the defendant participated in its commission.

25 "Willfully to cause criminal act" - defined.

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Charge

2 In order to cause another person to commit a
3 criminal act, it is necessary that the accused will-
4 fully do, or willfully fail to do, something which,
5 in the ordinary performance of official duty, or in
6 the ordinary course of the business or employment of
7 such other person, or by reason of the ordinary course
8 of nature or the ordinary habits of life, results in
9 the other person's either doing something the law
10 forbids, or failing to do something the law requires
11 to be done.

12 An act or a failure to act is "Willfully" done
13 if done voluntarily and intentionally, and with the
14 specific intent to do something the law forbids, or
15 with the specific intent to fail to do something the
16 law requires to be done; that is to say, with bad
17 purpose either to disobey or to disregard the law.

18 "Merely presence" not sufficient.

19 Merely presence at the scene of the crime and
20 knowledge that a crime is being committed are not
21 sufficient to establish that the defendant aided and
22 abetted the crime unless you find beyond reasonable
23 doubt that the defendant was a participant and not
24 merely a knowing spectator.

25 Therefore, as I have previously instructed you -

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2 To determine whether a defendant aided and
3 abetted the commission of an offense, you ask your-
4 selves these questions: Did he associate himself
5 with the venture? Did he participate in it as some-
6 thing he wished to bring about? Did he seek by that
7 to make it succeed? If he did, then he is an aider
8 and abettor.

9 "Essential elements of the offense".

10 Count two of the indictment charges that the
11 defendant, Paul Williams, did knowingly and intention-
12 ally distribute cocaine, a Schedule 2 narcotic drug
13 controlled substance.

14 The essential elements of this offense, each
15 of which the Government must prove beyond a reasonable
16 doubt are:

17 First: That the defendant did distribute
18 cocaine, a Schedule 2 narcotic drug controlled
19 substance, on or about the 10th day of July, 1974,
20 within the Eastern District of New York; and

21 (Continued on next page.)

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Paragraph Second: That the defendant did so distribute the cocaine knowingly and intentionally, on or about the 10th day of July, 1974, within the Eastern District of New York.

6

"Essential Elements of the Offense"

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Count six of the indictment charges that the defendant, Paul Williams, did knowingly and intentionally distribute heroin, Schedule 1 Narcotic Drug Control Substance.

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The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt:

14

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First: That the defendant did distribute heroin a schedule 1 Narcotic Drug Control substance on or about the 19th day of April, 1974, within the Eastern District of New York; and

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Paragraph Second: That the defendant did so distribute the heroin knowingly and intentionally, on or about the 19th day of April, 1974, within the Eastern District of New York.

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You are reminded that in considering each of the essential elements of the crime charged in Counts Two and Six of the indictment, that whoever aids, abets, counsels, commands, induces or procures the

2 1 Charge

2 commission of an offense against the laws of the United
3 States is punishable as a principal. In order to aid
4 or abet the commission of an offense against the laws
5 of the United States, a person must associate himself
6 with the criminal venture, participate in it, and
7 try to make it succeed.

8 As stated before, the burden is always upon
9 the prosecution to prove beyond a reasonable doubt
10 every essential element of the crime charged.

11 Always bear in mind that the law never imposes
12 upon a defendant in a criminal case the burden or
13 duty of calling any witness or producing any evidence.

14 Ladies and gentlemen, you will note the indictment
15 charges in each count that the offense was
16 committed "On or about" a certain date. The proof
17 need not establish with certainties the exact date
18 of the alleged offense. It is sufficient if the
19 evidence in the case establishes beyond a reasonable
20 doubt that the offense was committed on a date
21 reasonably near to the date alleged.

22 "Acts and Declarations of Co-Conspirators"

23 Whenever it appears beyond a reasonable doubt
24 from the evidence in the case that a conspiracy
25 existed, and that a defendant was one of the members

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2 then the statements thereafter knowingly made and
3 the acts thereafter knowingly done, by any person like-
4 wise found to be a member, may be considered by the
5 jury as evidence in the case as to the defendants
6 found to have been a member, even though the state-
7 ments and acts may have occurred in the absence and
8 without the knowledge of the defendant, provided such
9 statements and acts were knowingly made and done
10 during the continuance of such conspiracy, and in
11 furtherance of some object or purpose of the con-
12 spiracy.

13 Such evidence is admissible against a defendant
14 found to be a member of a conspiracy, whether or not
15 a conspiracy is actually charged in the indictment.

16 Therefore, you the jury must determine whether
17 or not the Government has proven a conspiracy between
18 Paul Williams and David White and Lance Hargrove named
19 in the indictment who allegedly made statements
20 during the course of and in furtherance of the
21 conspiracy. If you find such a conspiracy existed,
22 such statements by other co-conspirators made during
23 the course of and in furtherance of the conspiracy
24 would be admissible as against Paul Williams.

25 If you do not find beyond a reasonable doubt

Charge

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2 that such conspiracy existed, you may not consider
3 such evidence as against the defendant, Paul Williams.

4 That is to say, any admission or incriminatory
5 statement made by one person may not be considered by
6 you as evidence against the defendant who was not present
7 and did not hear the statement made, or see the act
8 done, unless you find that the declarant of the state-
9 ment and the defendant were engaged together in a
10 conspiracy.

11 Therefore, you the jury, must determine whether
12 or not a conspiracy existed between Paul Williams and
13 either David White or Lance Hargrove to violate the
14 narcotics laws of the United States, that is by knowingly
15 and intentionally conspiring to commit either the
16 offense of knowingly and intentionally distributing
17 or the offense of knowingly and intentionally possess-
18 ing with intent to distribute the narcotic drug
19 control substances named in each particular count
20 of the indictment.

21 "Conspiracy Defined -Proof of Existence"

22 A conspiracy is a combination of two or more
23 persons, by concerted action, to accomplish some
24 unlawful purpose or to accomplish some lawful
25 purpose by unlawful means. So, a conspiracy is a

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Charge

2 kind of "Partnership in Criminal Purposes", in which
3 each member becomes the agent of every other member.
4 The gist of the offence is a combination or agreement
5 to disobey, or to disregard the law.

6 Mere similarity of conduct among various persons,
7 and the fact they may have associated with each
8 other, and may have assembled together and discussed
9 names and interest, does not necessarily establish
10 proof of the existence of a conspiracy.

11 However, the evidence in the case need not
12 show that the members entered into any express or
13 formal agreement, or that they directly, by words
14 spoken or in writing, stated between themselves
15 what their object or purpose was to be, or the details
16 thereof, or the names by which the object or purpose
17 was to be accomplished. What the evidence in the case
18 must show beyond a reasonable doubt, in order to
19 establish proof that a conspiracy existed, is that
20 the members in some way or manner or through some
21 contrivance, expressly or tacitly, came to a mutual
22 understanding to try to accomplish a common and
23 unlawful plan.

24 The evidence in the case need not establish
25 that all the means or methods set forth in the indictment

6 1

Charge

2 were agreed upon to carry out the alleged conspiracy;
3 nor that all means or methods, which were agreed upon,
4 were actually used. All put into operation; nor that
5 all of the persons charged to have been members of
6 the alleged conspiracy were such. What the evidence
7 in the case must establish beyond a reasonable doubt
8 is that the alleged conspiracy was knowingly formed by
9 two or more persons, including the accused.

10 "Proof of Membership and Conspiracy"

11 When they become a member of a conspiracy with-
12 out full knowledge of all the details of the conspiracy.
13 On the other hand, a person who has no knowledge of a
14 conspiracy, but happens to act in a way which furthers
15 some object or purpose of the conspiracy, does not
16 thereby become a conspirator.

17 Before the jury may find that a defendant, or
18 any other person has become a member of a conspira-
19 cy, the evidence in the case must show beyond a reasonable
20 doubt that the conspiracy was knowingly formed, and
21 that the defendant, or other person who has claimed
22 to have been a member, willfully participated in the
23 unlawful plan, with the intent to advance or serve
24 some object or purpose of the conspiracy.

25 To act or participate willfully means to act

7 1 Charge

2 or participate voluntarily and intentionally, and
3 with specific intent to do something the law forbids,
4 or with specific intent to fail to do something the
5 law requires to be done; that is to say, to act or
6 participate with the bad purpose either to disobey
7 or to disregard the law. So, if a defendant, or any
8 other person, with understanding of the unlawful
9 character of a plan, knowingly encourages, advises
10 or assists for the purpose of furthering the under-
11 taking or scheme, he thereby becomes a willful
12 participant, a conspirator.

13 One who wilfully joins an existing conspiracy
14 is charged with the same responsibility as if he had
15 been one of the originators or instigators of the
16 conspiracy.

17 In determining whether a conspiracy existed, the
18 jury should consider the actions and declarations
19 of all of the alleged participants. However, in
20 determining whether a particular individual was a
21 member of the conspiracy, the jury should consider
22 only his acts and statements. He cannot be bound
23 by the acts or declarations of other participants
24 until it is established that a conspiracy existed
25 beyond a reasonable doubt, and that he was one of its

81 Charges

2 members.

3 "Essential Elements of Conspiracy"

4 It is not necessary in order for the Government
5 to prove its case of a conspiracy to violate the
6 narcotics law, that there be proof of actual dealings
7 in narcotics.

22 Fourth: That the defendant, Paul Williams
23 knowingly, intentionally and wilfully became a member
24 of the conspiracy.

25 If the jury should find beyond a reasonable doubt

9 1

Charge

2 all of the evidence in the case that the existence of
3 the conspiracy and the defendant's participation in
4 it has been proven beyond a reasonable doubt, then
5 proof of the conspiracy offense is complete.

6 And as I have previously instructed you--

7 Whenever it appears beyond a reasonable doubt
8 from the evidence in the case that a conspiracy
9 existed, and that the defendant was one of the members
10 then the statements thereafter knowingly made and
11 the acts thereafter knowingly done, by any person
12 likewise found to be a member may be considered by the
13 jury as evidence in the case as to the defendant found
14 to have been a member, even though the statements and
15 acts may have occurred in the absence and without the
16 knowledge of the defendant, provided such a statement
17 and acts were knowingly made and done during the
18 continuance of such conspiracy, and in furtherance of
19 some object or purpose of the conspiracy. This is
20 true even though the conspirators may not have
21 succeeded in accomplishing their common purpose
22 and in fact may have failed of so doing. Otherwise,
23 any admission or incriminatory statement made or acts
24 done outside of court by one person, may not be con-
25 sidered as evidence against any person who was not present

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2 and did not hear the statement made, or see the act
3 done.

4 Therefore, statements of any conspirator,
5 which are not in furtherance of the conspiracy, or
6 made before its existence, or after its termination,
7 may be considered as evidence only against the person
8 making them.

9 Please bear in mind the following definitions
10 in considering the essential elements of the crimes
11 charged.

12 "Distribute" defined.

13 The term "Distribute" means to deliver a narcotic
14 drug control substance to the possession of another
15 person, which in turn means the actual, constructive,
16 or attempted transfer of a narcotic drug controlled
17 substance.

18 "Definition of Possession"

19 The law recognizes two kinds of possession; actual
20 possession and constructive possession. A person who
21 knowingly has direct physical control over a thing
22 at a given time, is then in actual possession of it.

23 A person who, although not in actual possession,
24 knowingly has the power at a given time to exercise
25 dominion or control over a thing, is then in constructive

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Charge

2 possession of it.

3 The law recogn...es also that possession may be
4 sole or joint. If one person has actual or constructive
5 possession of a thing possession is sole. If two
6 or more persons share actual or constructive possess-
7 ion of a thing, their possession is joint. If you
8 find from the evidence beyond a reasonable doubt that
9 the defendant, either alone or with others had actual
10 or constructive possession of the narcotic drug
11 described in the particular count of the indictment,
12 then you may find that the narcotic drug was in the
13 possession of defendant within the meaning of the word
14 "Possession" as used in these instructions. Actually
15 manual or person possession is not a necessary ele-
16 ment of the crime. It is sufficient if the possession
17 is constructive, if merchandise is shown to be under
18 the control of the person charged though in actual
19 physical possession of another. The Government does
20 not have to prove that the narcotics drug was
21 possessed by the defendant for any particular length
22 of time.

23 "Knowingly"

24 An act is done knowingly if done voluntarily
25 and intentionally and not because of mistake or accident

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Charge

2 or other innocent reason.

3 The purpose of adding the word "Knowingly" was
4 to insure that no one would be convicted for an act
5 done because of mistake or accident, or other innocent
6 reason.

7 An act is done wilfully if done voluntarily
8 and intentionally, and with the specific intent to
9 do something the law forbids; that is to say, with
10 bad purpose either to disobey or to disregard the law.

11 "Definition of Specific Intent"

12 This is applicable to all offenses charged in
13 the indictment.

14 The crimes charged in this case are serious
15 crimes which require proof of specific intent before
16 a defendant can be convicted. Specific intent, as
17 the term implies, means more than the general intent
18 to commit the act. To establish specific intent, the
19 Government must prove that a defendant knowingly did
20 an act with which the law forbids, purposely intending
21 to violate the law. Such intent may be determined
22 from all the facts and circumstances surrounding the
23 case.

24 Intent ordinarily may be proved directly, be-
25 cause there is no way of fathoming or scrutinizing

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Charge

2 the operations of the human mind. But you may infer
3 the defendant's intent from the surrounding circum-
4 stances. You may consider any statement made and
5 act done or omitted by a defendant, and all other
6 facts and circumstances in evidence which indicate
7 his state of mind. It is ordinarily reasonable to
8 infer that a person intends the natural and probable
9 consequences of acts knowingly done or knowingly
10 omitted.

11

Reasonable Doubt.

12

Now, there are in any case, and in this one, two types of evidence from which a jury may properly find a defendant guilty of a crime, one is direct evidence such as testimony of an eyewitness, the other is circumstantial evidence, which is proof of a chain of facts and circumstances pointing to the commission of the offense.

19

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that before convicting a defendant the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

24

A defendant is presumed innocent of the crime. Thus the defendant, although accused, begins the trial

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Charge

2 with a clean slate and with no evidence against him,
3 and the law permits nothing but legal evidence to be
4 presented before a jury to be considered in support of
5 any charge against the accused, so that the presumption
6 of innocence alone is sufficient to acquit a defendant
7 unless you, the jury, are satisfied beyond a reasonable
8 doubt of the defendant's guilt after careful and
9 impartial consideration from all the evidence in the
10 case.

11 It is not required that the Government prove
12 guilt beyond all possible doubt. The test is one of
13 reasonable doubt, and reasonable doubt is based upon
14 reason and common sense, the kind of doubt that would
15 make a reasonable person hesitate to act. Proof beyond
16 a reasonable doubt must, therefore, be proof of such a
17 convincing character that you would be willing to
18 rely and act upon it unhesitatingly in the most import-
19 ant of your own affairs.

20 You, the jury will remember that a defendant is
21 never to be convicted on mere suspicion or conjecture.
22 The burden is always upon the prosecution to prove
23 guilt beyond a reasonable doubt. This burden never
24 shifts to a defendant. The law never imposes upon a
25 defendant in a criminal case the burden or duty of call-

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Charge

2 ing any witnesses or producing any evidence.

3 So, if the jury views the evidence in the case
4 as reasonably permitting either of two conclusions, one
5 of innocence, the other of guilt, you, the jury,
6 should, of course, adopt the conclusion of innocence.

7 I have said that the defendant may be proven
8 guilty either by direct or circumstantial evidence.
9 I have said that direct evidence is the testimony of
10 one who asserts actual knowledge of a fact, such as
11 an eyewitness. Also circumstantial evidence is proof
12 of a chain of facts and circumstances indicating the
13 guilt or innocence of a defendant. You, the jury,
14 may make commonsense inferences from the proven facts.

15 It is not necessary that all inferences drawn
16 from the facts in evidence be consistent only with
17 guilt and inconsistent with every reasonable hypothesis
18 of innocence. The test is one of reasonable doubt,
19 and should be based upon all the evidence, the testimony
20 of the witnesses, the documents offered into evidence
21 and the reasonable inferences which can be drawn from
22 the proven facts.

23 An inference is a deduction or conclusion
24 which reason and common sense lead the jury to draw
25 from the facts which have been proved.

16

1 Charge

2 You are to consider only the evidence in this
3 case. But in your consideration of the evidence, you are
4 not limited to the bald statements of the witnesses.
5 On the contrary, you are permitted to draw, from
6 the facts which you find have been proved, such
7 reasonable inferences as seem justified in the light
8 of your own experience.

9 A reasonable doubt may arise not only from the
10 evidence produced, but also from a lack of evidence.
11 Since the burden is upon the prosecution to prove
12 the accused guilty beyond a reasonable doubt very
13 essential element of the crime charged, a defendant
14 has the right to rely upon failure of the prosecution
15 to establish such proof.

16 "Proof of Knowledge and Intent"

17 Knowledge and intent exists in the mind. Since
18 it is not possible to look into a man's mind to see
19 what went on, the only way you have for arriving at a
20 decision in these questions is for you to take into
21 consideration all the facts and circumstances shown by
22 the evidence, including the exhibits, and to determine
23 from all such facts and circumstances whether the
24 requisite knowledge and intent were present at the
25 time in question. Direct proof is unnecessary. Knowledge

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Charge

2 and intent may be inferred from all the surrounding
3 circumstances.

4 As far as intent is concerned, you are instructed
5 that a person is presumed to intend the natural and
6 probable, or ordinary, consequences of his act.

7 Credibility of Witnesses.

8 You as jurors are the sole judges of the credi-
9 bility of the witnesses and the weight their testimony
10 deserves and it goes without saying that you should
11 scrutinize all the testimony given, the circumstances
12 under which each witness has testified, and every
13 matter in evidence which tends to show whether a wit-
14 ness is worthy of belief. Consider each witness'
15 intelligence, motive and state of mind, and his
16 demeanor and manner while on the stand. Consider
17 the witness' ability to observe the matter as to which
18 he has testified, and whether he impresses you as
19 having an adequate recollection of these matters.
20 Consider also any relation each witness may bear to
21 either side of the case; the manner in which each
22 witness might be affected by the verdict; and the
23 extent to which, if at all, each witness is either
24 supported or contradicted by other evidence in the
25 case.

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Charge

Inconsistencies and Discrepancies in the
testimony of a witness, or between the testimony of
different witnesses, may or may not cause the jury to
discredit such testimony. Two or more persons witness-
ing an incident or a transaction may see or hear it
differently; and innocent misrecollection, like failure
of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

13 After making your own judgment, you will give
14 the testimony of each witness such credibility, if
15 any, as you may think it deserves. Another test that
16 you can use in determining the truthfulness of cred-
17 ibility of a witness is to use your own good common
18 sense in addition to these essential that I have given
19 you. You can use your good common sense as you do in
20 your every day experience where you must make important
21 decisions based upon what others tell you. When you
22 decide to either accept or ignore the statements of
23 others you use your common sense. Your good judgment
24 will say to you somehow or other that whatever they
25 say does not appear to be truthful, that somehow

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Charge

2 or other you just do not believe what they have said.
3 That is your ability to reason, your ability to deter-
4 mine the truthfulness of the person you are speaking
5 with. Likewise, your common sense should be used
6 to determine the weight to be given the testimony
7 of a witness.

8 You take that same good common sense into the
9 jury room, you do not leave it outside. In addition
10 to what I have said, use your common sense as a test
11 in exercising your good judgment and in determining
12 whether or not this defendant is guilty of the crimes
13 charges. It is for you to determine whether the
14 witnesses in this case have testified truthfully,
15 whether or not they have an interest in the case,
16 what that interest may be and how great it is and
17 whether or not they have told you falsehoods. This
18 is all for you to determine.

19 Every witness' testimony must be weighed as
20 to his truthfulness. If you find any witness lied
21 as to any material fact in the case, then the law
22 gives you certain privileges. One of those privileges
23 is that you have the right to disregard the entire
24 testimony of that witness. If you find, however,
25 that you can sift through that testimony and determine

20 1

Charge

2 which of the testimony is true and which was false,
3 then the law allows you to take the portions which
4 were true and weigh it and disregard those portions
5 which were false. That again is within your pre-
6 rogative.

7 The weight of the evidence is not necessarily
8 determined by the number of witnesses testifying
9 on either side. You should consider all the facts
10 and circumstances in evidence to determine which of the
11 witnesses are worthy of greater credence. You may
12 find that the testimony of a smaller number of witnesses
13 on one side is more credible than the testimony of a
14 greater number of witnesses on the other side.

15 You are not obliged to accept testimony, even
16 though the testimony is uncontradicted and the witness
17 is not impeached. You may decide, because of the
18 witness' bearing and demeanor or because of the inherent
19 improbability of his testimony, or for other reasons
20 sufficient to you, such testimony is not worthy of
21 belief.

22 The Government is not required to prove the
23 essential elements of the offense as defined in these
24 instructions by any particular number of witnesses.
25 The testimony of a single witness may be sufficient to

21

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Charge

2 convince you beyond a reasonable doubt of the existence
3 of an essential element of the offense charged, if
4 you believe beyond a reasonable doubt that the witness
5 is telling the truth.

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All available evidence need not be produced.

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(continued next page)

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Charge of the Court

THE COURT: (continuing) Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.

The jury will always bear in mind the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence and no adverse inferences may be drawn from his failure to do so.

Absence of witness.

If it is peculiarly within the power of either the prosecution or the defense to produce a witness who could give material testimony on an issue in the case, failure to call the witness may give rise to an inference that his testimony would be unfavorable to that party. However, no such conclusions should be drawn by you with regard to a witness who is equally available to both parties or where the

2 1 Charge of the Court

2 witness's testimony would be merely cumulative.

3 The jury will always bear in mind the law
4 never imposes upon the defendant in a criminal case
5 the burden or duty of calling any witness or
6 producing any evidence.

7 "Identification of defendant."

8 The evidence in this case raises the question
9 of whether the defendant was in fact the criminal
10 actor and necessitates your resolving any conflict or
11 uncertainty in testimony on that issue.

12 The burden of proof is on the prosecution with
13 reference to every element of the crime charged and
14 this burden includes the burden of proving beyond a
15 reasonable doubt the identity of the defendant as the
16 perpetrator of the crime charged.

17 Identification may be made through the
18 perception of any of the witness's senses. It is not
19 essential that the witness himself be free from doubt
20 as to the correctness of his opinion. You as the
21 jury may treat the identification testimony as a
22 statement of fact by the witness: (1) if the witness
23 had the opportunity to observe the accused; (2) if the
24 witness is positive in his identification and (3) if,
25 after cross-examination his testimony remains positive

3 1 Charge of the Court

2 and unqualified. In the absence of any one of these
3 three conditions, however, the witness' testimony as
4 to the identity must be received with caution and
5 scrutinized with care.

6 In each count of the indictment it is alleged
7 that a particular amount or quantity of a particular
8 narcotic drug was involved. The evidence in the case
9 need not establish that the amount or quantity of
10 the narcotic drug was as alleged in the indictment,
11 but only that some measurable amount of the narcotic
12 drug was in fact the subject of the acts charged in
13 the particular count of the indictment.

14 You will, of course, first ascertain whether or
15 not the substance in question is in fact heroin or
16 cocaine as alleged; and in so doing you will consider
17 all evidence in the case which may aid determination
18 of that issue, including the testimony of any expert
19 or chemist, or other witness, who may have testified
20 either to support or dispute the allegation that the
21 substance in question is heroin as charged.

22 Opinion evidence - expert witness.

23 The rules of evidence ordinarily do not permit
24 witnesses to testify as to opinions or conclusions.

25 An exception to this rule exists as to those whom we

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Charge of the Court

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call expert witnesses. Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert and they also state their reasons for the opinion.

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You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that your opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

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Testimony of Government officials.

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The probable truthfulness and believability of every witness is for you to decide; that I have already instructed you. The fact that such witnesses come before you as Government agents or policemen should not in the least change your attitude in this respect. Their testimony does not deserve either greater or lesser believability, simply because of their official status.

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Charge of the Court

2 Whether you do or do not believe any witness
3 must depend upon how for you to judge that witness
4 after you have heard the testimony and formed your
5 own conclusions as to the witness' believability.

The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

17 If a witness is shown knowingly to have
18 testified falsely concerning any material matter,
19 you have a right to distrust such witnesses'
20 testimony in other particulars; and you may reject
21 all the testimony of that witness or give it such
22 credibility as you may think it deserves.

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Charge of the Court

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"Effect of failure of accused to testify."

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The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of innocence or guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

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As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

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"Judging the evidence."

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There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense; consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If an accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a

7 1 Charge of the Court

2 violation of your sworn duty to base a verdict of
3 guilty upon anything other than the evidence in the
4 case; and remember as well that the law never imposes
5 on a defendant in a criminal case the burden or duty
6 of calling any witness or producing any evidence.

7 "Jury's recollection controls."

8 If any reference by the Court or by counsel to
9 matters of evidence does not coincide with your own
10 recollection, it is your recollection which should
11 control it during your deliberations.

12 Punishment.

13 Now, under your oath as jurors, you cannot
14 allow a consideration of the punishment which may be
15 imposed upon the defendant, if convicted, to influence
16 your verdict in any way or in any sense enter into
17 your deliberations.

18 The duty of imposing sentence rests exclusively
19 upon the Court. Your function is to weigh the
20 evidence in the case and to determine the guilt or
21 innocence of the defendant solely upon the basis of
22 such evidence and the law.

23 You are to decide the case upon the evidence
24 and the evidence alone, and you must not be influenced
25 by any assumption, conjecture, or sympathy, or any

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Charge of the Court

2 inference not warranted by the facts until proven to
3 your satisfaction.

4 "Exclude sympathy and antipathy."

5 In reaching your verdict you are not to be
6 affected by sympathy or antipathy for any of the
7 parties, what the reaction of the parties or of the
8 public to your verdict may be, whether it will please
9 or displease anyone, the popular or unpopular or
10 indeed, any consideration outside the case as it has
11 been presented to you in this courtroom.

12 You should consider only the evidence, both
13 the testimony and the exhibits, find the facts from what
14 you consider to be the believable evidence, and apply
15 the law as I now give it to you to those facts. Your
16 verdict will be determined by the conclusion thus
17 reached, no matter whom the verdict helps or hurts.

18 "Unanimous verdict."

19 Now, in this type of case there must be a
20 unanimous verdict, that means all twelve of you must
21 agree, and it goes without saying that it becomes
22 incumbent upon you to listen to one another and to
23 argue out the points amongst yourselves in order to
24 determine in good conscience whether your fellow
25 jurors' argument is one commensurate with yours or

9 1 Charge of the Court

2 whether at least you can with good conscience agree
3 with him. You have no right to stubbornly and idly
4 sit by and say "I'm not talking to anyone," "I'm not
5 going to discuss it" because people with common sense
6 and the ability to reason must communicate, they must
7 communicate their thoughts. So, anything which appears
8 in the record on about which one of you may not
9 agree, talk it out amongst yourselves and then if
10 you can't agree as to what is in the record, well, you
11 can ask the Court to have that portion of the
12 testimony read back to you. You may do so by knocking
13 on the door and giving a note in writing to the U.S.
14 Marshal who will then present it to the Court, and I
15 will then bring you into the courtroom.

16 The foreman will preside over your deliberations
17 and will be your spokesman here in Court.

18 As to the form of verdict; as to Count 1, it's
19 not guilty or guilty; Count 2, guilty or not guilty;
20 as to Count 5, guilty or not guilty; as to Count 6,
21 not guilty or guilty.

22 Now, you will have in the jury room with you
23 to use during your deliberations a copy of the
24 indictment as to the defendant Paul Williams, and you
25 will also have all the evidence which has been submitted

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1 Charge of the Court

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in this case. You may use these during your
3 deliberations.

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At this time, the Alternate Juror No. 1 and
5 No. 2 are excused and discharged with the thanks of
6 the Court. You are discharged from further service,
7 you may go into the jury room and take your things
8 and leave.

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(Whereupon Alternate Jurors were excused.)

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THE COURT: Any exception to the charge?

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MR. KELLY: No exception.

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MR. ROCCO: None, your Honor.

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THE COURT: The jury may go out and deliberate.

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(Whereupon two U.S. Marshals were sworn in by
15 the Clerk of the Court.)

CERTIFICATE OF SERVICE

Feb 2 , 1977

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan Gilbermann